No. (1)

Supreme Court, U.S.
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Supreme

October Term 1998

CANDACE L. COOPER,

Petitioner,

v.

STATE OF NORTH CAROLINA, on the relation of James E. Long, Commissioner of Insurance, as Liquidator of Twentieth Century Life Insurance Company,

Respondent.

GLENN H. MARTIN,

Petitioner,

v.

STATE OF NORTH CAROLINA, on the relation of James E. Long, Commissioner of Insurance, as Liquidator of Twentieth Century Life Insurance Company,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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Questions Presented

1. Whether a Summary Judgment based on affidavits made on information and belief is permissible under Federal Rule of Civil Procedure 56.

2. Whether a Summary Judgment based on affidavits made by an interested party or agents of an interested party in favor of that party is permissible under Federal Rule of Civil Procedure 56.

3. Whether a Summary Judgment based on copies of papers or parts thereof referred to in an affidavit but not sworn to or certified is permissible under Federal Rule of Civil Procedure 56.

4. Whether a Summary Judgment based on a criminal conviction not yet final is permissible under Federal Rule of Civil Procedure 56.

5. Whether denial of the Motions of Cooper and Martin for Leave to Amend Answer constituted abuse of discretion.

6. Whether denial of the Motions of Cooper and Martin for Leave to Amend Answer violated Cooper's and Martin's rights under the Fifth Amendment to the U.S. Constitution.

7. Whether North Carolina General Statute § 75D is a criminal or quasi-criminal statute, thus grant of summary judgment violated Martin's right to due process under the U.S. Constitution.

List of All Parties

State of North Carolina on the relation of James E. Long, Commissioner of Insurance, as Liquidator of Twentieth Century Life Insurance Co.

Glenn H. Martin

Candace L. Cooper

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None. The opinion of the Court of Appeals for the Fourth Circuit was unpublished.

Statement of Jurisdictional Grounds

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 23, 1998. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sec. 2101(c).

Relevant Constitutional, Statutory and Rule Provisions

Federal Rule of Civil Procedure 56(e)provides in relevant part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Federal Rule of Civil Procedure 15(a) provides in relevant part:

> Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Amendment VI to the U.S. Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

> crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

N.C.G.S. §75D-3 provides in relevant part that:

> (b) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents..."

N.C.G.S. §75D-4 provides in relevant part:

(a) No person shall:

> (1) Engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or
> (2) Conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or * * *

N.C.G.S. §75D-8. Available RICO civil remedies, provides in relevant part:

> (c) Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 74D-4 involving a pattern of

racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees.

Statement of Case

The Commissioner of Insurance for the State of North Carolina brought suit as Liquidator of Twentieth Century Life Insurance Company (referred to as TCL) against Cooper, former corporate secretary and employee of the insurance company, asserting state law claims for damages based on North Carolina civil RICO remedies and conspiracy to commit fraud. The Commissioner brought suit against Martin, former Twentieth Century Life Insurance Company President, majority shareholder in the holding company which was the sole shareholder of the life insurance company, and employee of the insurance company, asserting claims for damages based on North Carolina civil RICO, breach of fiduciary duty, common law fraud, and conspiracy to commit fraud. Jurisdiction in the District Court was founded on diversity of citizenship, 28 U.S.C. 1332. Plaintiff is a North Carolina corporation. Defendants are citizens of Florida.

While criminal trials in the Middle District of Florida were pending, Cooper and Martin refused to answer specific allegations of the Complaint based on each of their rights under the Fifth Amendment to the U.S. Constitution, and this proceeding was stayed. Following conclusion of the criminal proceedings the stay was lifted.

On November 14, 1995, shortly after the initial date scheduled for the sentencing hearing on the criminal charges, counsel for Martin made their initial appearance and Moved for Leave to Amend. While no proposed amendment was submitted with the motion, the Motion noted that the government had moved to continue the sentencing hearing to November 27, 1995, and requested that Martin be "allowed to file his amended pleadings (10) ten days after the granting of this motion or ten days after the sentencing hearing, which ever is later." [A 20] Cooper made her motion to supplement her answers at a time when she was still scheduled for sentencing on November 9, 1995. [A 22]

Following a settlement conference in which the "Court recommended that the defendants work on settling this case by possibly signing a confession of judgment," [Docket notation] the court entered an Order denying leave to amend on January 16, 1996, reciting that "To date, the court still is in the dark with regard to what affirmative defenses and counterclaims Martin would add, if permitted to do so. Because the court perceives that permitting Martin to file an Amended Answer and counterclaims at this late date would be unduly prejudicial as well as futile, Martin's motion to file Amended Answer and counterclaims, too, is DENIED." [A 10][1] No recitation was made by the Court for the basis of its finding, how grant of Martin's Motion would be unduly prejudicial or the substantive or procedural basis upon which the Court concluded that Amendment would be futile.

Each of their Motions for Leave to Amend and for time for discovery were denied by the Court by Order dated January 16, 1996, on the grounds that granting leave would be unduly prejudicial and futile. [A 10]

By that same Order dated January 16, 1996, on Motion for Partial Summary Judgment by Plaintiff, the Court granted judgment against Defendant Cooper on the fraud claim in the amount of $9,085,425.67.

Glenn H. Martin, acting pro se, filed Affidavits in opposition to Plaintiff's Motion for Summary Judgment, dated January 18, 1996, (Martin Affidavits, A 652, 656), but recited "that to the best of my knowledge the foregoing AFFIDAVIT is true and correct, except as to those matters upon which I rely on information and belief, and as to those matters I do believe them to be true."

By Order dated February 1, 1996, the Court granted Plaintiff's Motion for Partial Summary Judgment against Defendant Martin on Counts I and II of the Complaint (North Carolina civil RICO) in the amount of $9,085,425.67, trebled to $27,256,277.

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[1]The court's final dispositive Order dated January 31, 1996, filed February 1, 1996, incorrectly recites that "Martin...neglected...to take advantage of an opportunity extended by the Magistrate Judge to amend his Answer...." The record reflects that no action was taken by the court prior to the January 16, 1996 Order. [JA 703]

By Order dated February 21, 1996, the Court entered judgment against Cooper in the amount of $9,085,425.67, and against Martin in the sum of $27,256,277. All other claims were voluntarily dismissed on motion of Plaintiff. No opinion or findings were filed, other than those contained in the Order of January 16, 1996, and February 1, 1996.

Supporting the judgments rendered were the following:

1. The Affidavit of Joseph B. Holloway, Jr., dated February 5, 1993, in which it the affiant states "I have personal knowledge of the facts set out in this affidavit, **except as to those matters set out on information and belief**...." No designation of what facts are on personal knowledge and what facts are information and belief is made in the affidavit. The affiant further states "I have assisted Commissioner Long and his deputies more or less continuously since March 1, 1991, with respect to the rehabilitation and liquidation of TCL and with respect to financial matters involving the company...."

2. The Affidavit of W. A. Spencer, in which the affiant states "I have personal knowledge of the facts set out in this affidavit, **except as to those matters set out on information and belief**...." No designation is made of what facts are on personal knowledge. The affiant further states "[S]ince January, 1985, I have served as a Senior Deputy Commissioner of Insurance for Company Services of the State of North Carolina. Since 1985 I have been a member of the Senior Management of the Insurance Department...."

3. The Affidavit of Melvin J. Dillon, in which the affiant states "Beginning in 1985 **I have served as a Special Deputy Commissioner of Insurance** to North Carolina Insurance Commissioner James E. Long * * * I have provided consulting services with respect to Twentieth Century Life Insurance Company...."

4. The Affidavit of W. H. Odell, in which the affiant states "**I have been requested by the Liquidator** of [TCL] to examine certain records of the Company and to give an opinion concerning certain matters relating to the reserve liability of the Company." The affiant futher states:

> This report is prepared for utilization only by the Liquidator * * * in connection with certain legal

> proceedings. * * * Our findings are based upon the information available to us. * * * [W]e did not perform an independent audit or verification of the basic redoreds [sic] of the Company. * * * It is possible that an examination of all data possibly available would result in additional findings.

5. Deposition[s] of Louann Foulkes, taken in other cases, and submitted as exhibits to Holloway's affidavit of February 5, 1993, and Cooper's Response to Plaintiff's Motion for Partial Summary Judgment, **not sworn or certified.**

6. Affidavit of Leigh Meininger, [A 97] Martin's Trustee in bankruptcy.

7. Copies of TCL 1989 Annual Statement and June 30, 1990, Quarterly Statements, **not sworn or certified.**

8. Order of Liquidation of TCL **not sworn or certified.**

9. The sentencing proceedings of Martin and Cooper, **not sworn or certified.**

10. Further Affidavit of Joseph B. Holloway, Jr. [October 12, 1994], in which the affiant states "I have personal knowledge of the facts set out in this affidavit, **except as to those matters set out on information and belief....**"

11. The Indictments against Cooper and Martin [A 65] in related criminal cases in the Middle District of Florida.

14. The verdicts in the trials of Cooper and Martin, and the plea agreement of Hevey, in related non-RICO criminal cases in the Middle District of Florida. [A 28, 33]

Jurisdiction in the Court of Appeals was founded on F.R.A.P. 3. Judgment was entered February 22, 1996, Notice of Appeal was filed by Cooper pro se on February 14, 1996 and Martin on March 18, 1996. The decision of the District Court was affirmed per curiam in an unpublished opinion "essentially on the reasoning of the district court." This appeal is from a final order.

Argument

Writ of certiorari should be granted in this case because the courts below outrageously and egregiously rendered judgment directly contrary to prior decisions of this Court construing the requirements of Federal Rule of Civil Procedure 56, Federal Rule

of Civil Procedure 15, and the spirit of the Rules as a whole. Without strict adherance to the requirements of Rule 56 by the lower courts, and supervision of that adherance by this Court, summary judgment practice becomes an opportunity for trial courts to adjudicate by prejudice, assumption, and hearsay without opportunity for litigants to test the credibility or accuracy of purported evidence, and an indictment of the fundamental fairness of the judicial process. The appropriateness of the exercise by this Court of its supervisory responsibility is enhanced where, as in this case, the Court of Appeals abdicates its supervisory function over the District Court by rendering an unpublished decision per curiam, failing to distinguish or othewise disclose the appropriate application of prior decisions of this Court directly in conflict with action taken by the District Court, in effect sanctioning the failure of the District Court to comply with the requirements of the Rules.

Strict adherance to the requirements of the Rules is even more essential to the impartial and fundamentally fair administration of justice where it is likely there will be prejudice against a party, as in this case where each of the defendants were convicted of related charges not having substantively identical material fact questions but arising out of the same transactions.

I. Summary Judgments

A. Standard of Review

Grant of a summary judgment is reviewed de novo. *Taggart v. Time Inc.*, 924 F.2d 43, 45-46 (2nd Cir. 1991). As stated by this Court in *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944):

> Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they

> really have issues to try. 321 U.S. at 627, 64 S.Ct. at 728

An issue is genuine if there is sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties' differing version of the truth at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed. 202 (1986). If reasonable minds could differ as to the import of the evidence, a summary judgment should not be granted. Id., 477 U.S. at 251-52, 106 S.Ct. at 2512. Where a witness is interested, his credibility must be submitted to the jury as a question of fact. *Sartor*, 321 U.S. at 628, 64 S.Ct. at 729.

The governing substantive law determines what facts are material; only disputes over facts that might affect the outcome of the suit will preclude summary judgment. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

The moving party has the burden of showing the absence of any genuine issues of material fact, thus the evidence must be viewed in the light most favorable to the opposing party—the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes v. S. H. Kress and Company*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Where the movant bears the burden of proof on an issue, "he must establish beyond all peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor." (emphasis in original) *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). To avoid summary judgment once the movant has met his burden, the nonmovant must "designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 , 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Federal Rule of Civil Procedure 56(e) provides that:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to

> testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Affidavits made upon information and belief do not comply with the rule and constitute no evidence. *Automatic Radio Mfg. Co., Inc. v. Hazeltine Research, Inc.*, 339 U.S. 827, 831, 70 S.Ct. 894, 896 (1950). When determining whether summary judgment is proper, statements contained in affidavits which would be inadmissible in evidence (such as statements of opinion, belief and hearsay) must be disregarded, *Neff v. World Publishing Company*, 349 F.2d 235, 253 (8th Cir. 1965), although evidence "admissible in content, in the sense that a change in form but not in content, for example a substitution of oral testimony for a summary of that testimony in an affidavit, would make the evidence admissible at trial" is within the intent of the Rule. *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. at 2553. Hearsay is entitled to no weight. *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 556 (5th Cir. 1980), rehearing denied 642 F.2d 1210, certiorari denied 102 S.Ct. 425, 454 U.S. 927, 70 L.Ed.2d 236.

Offered documents must comply with the Rule as well. "To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §2722.

B. Substantial Portions of the Evidence Before the District Court Do Not Comply with the Standards Imposed by This Court

The state of the record presented for review is astonishing in its lack of compliance with the express terms of Rule 56. Of over 3,450 pages of materials submitted by TCL and approximately 50 pages submitted by Martin, less than 160 pages comply with the express terms of the Rule. The only two Affidavits complying with the requirement of Rule 56(e) that affidavits be "made on personal knowledge" are those of Melvin J. Dillon dated February

8, 1993, [A 25] an interested witness regularly employed by the North Carolina Commissioner of Insurance, and that of Leigh Meininger, [A 97] Martin's Trustee in Bankruptcy. Dillon's affidavit is not available to support the Martin judgment since filed in the Cooper case prior to the Order consolidating the Cooper and Martin cases, and not filed in support of the later Motion for Summary Judgment against Martin. The sole deposition in this case available for consideration is that of Louis J. Hevey, in which he refuses to answer any question and asserts in response to all questions his Fifth Amendment privilege.

One of two certified copies of a document is the Plea Agreement of Louis J. Hevey, Case No. 95-69-Cr-Orl-19, United States District Court, Middle District of Florida, Orlando Division, dated November 9, 1994. The second is the indictment and verdict in Case No. 95-69-Cr-Orl-19, United States District Court, Middle District of Florida, Orlando Division. [A 65, 28, 33][2] While the Verdict in the trial of Cooper and Martin and the plea agreement of Hevey are within the record, since apparently properly certified by the Clerk of the U.S. District Court for the Middle District of Florida, they are admissible under Federal Rule of Evidence 803(22) only "to prove any fact **essential** to sustain the judgment." Fed. R. Evid. 803(22). This limitation renders the great bulk of the "facts" found in the Hevey Plea Agreement inadmissible hearsay. Under the standard articulated by the Supreme Court in *Williamson v. U. S.*, 512 U.S. 594, 114 S. Ct. 2431, 129 L.Ed. 2d 476 (1994), Hevey's statements relevant to the actions of Martin and Cooper were **not** "against interest" under Federal Rule of Evidence 804(b)(3), and thus would not be admissible. The Indictment [JA 487-525] is also within the record, and is admissible and essential for the limited purpose of determining what facts are "**essential** to sustain the judgment,"

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[2]These assertions must be qualified, however, by the observation that neither of the counsel for appellants had in his possession a fully complete copy of the record due to the history of representation of Cooper and Martin by various geographically dispersed counsel and financial limitations which precluded obtaining a complete copy of the record directly from the court. No additional materials were brought to the attention of Petitioners or the Court of Appeals in the proceedings, however.

Fed. R. Evid. 803(22), by reference to the charges made for which a guilty verdict was rendered.

The balance of the materials before the District Court were based upon affidavits specifically made upon information and belief. As noted by the court in *Lark v. West*, 182 F.Supp. 794, 798, (D.C.D.C. 1960), affirmed 289 F.2d 898, certiorari denied 82 S.Ct. 114, 368 U.S. 865, 7 L.Ed.2d 63, "[B]elief, no matter how sincere, is not equivalent to knowledge, and facts set forth in an affidavit in opposition to a motion for summary judgment must be such as would be admissible in evidence should they be given from the witness stand during the trial of a case." The affidavits themselves do not disclose which facts are on personal knowledge and which facts are based on information and belief; thus, for purposes of summary judgment in taking the evidence in the light most favorable to the non-movant the affidavits should be disregarded in their entirety. *See Automatic Radio Mfg. Co., Inc*, supra. The documents attached to the defective affidavits, unless separately sworn or certified, must be disregarded as well since not meeting the express requirements of Rule 56(e). *See* Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* §2722. None other than as noted above are so sworn or certified.

C. Portions of the Evidence Before the District Court Which Did Comply with the Standards Imposed by This Court Are Insufficient to Support the Summary Judgment Rendered

Viewing the evidence complying with Rule 56 in the light most favorable to the opposing party Martin, *Adickes*, supra, U.S. at 157, S.Ct. at 1608, the Summary Judgment is not supported by the evidence.

1. Basis for Claim by and Status of North Carolina Commissioner of Insurance.

This action was brought by the North Carolina Commissioner of Insurance as Liquidator of TCL, and in no other capacity. In that capacity, the liquidator stands in the shoes of TCL, and may assert only claims which TCL could assert. *North Carolina v. Alexander & Alexander*, 680 F.Supp. 746 (E.D.N.C. 1988).

2. Summary Judgment under North Carolina RICO

a. Applicable Substantive Law

Summary judgment was rendered against Martin under the North Carolina state RICO statute, N.C.G.S. §75D-8. That section provides:

> §75D-8. Available RICO civil remedies.
>
> > (c) Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 74D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees.

Thus, the following are four essential elements under the statute:

1. That TCL was an innocent person;
2. That TCL was injured or damaged in its business or property;
3. By reason of;
4. Any violation of N.C.G.S. 74D-4 involving a pattern of racketeering activity.

The meaning of each is discussed in detail in the following sections.

(1). An "innocent person"

N.C.G.S. §75D-8, in contrast to the federal civil RICO statute 18 U.S.C. 1962, requires by its express language that the plaintiff in a North Carolina RICO action be an "**innocent** person." "Innocent" in its relevant sense means "Not exposed to or familiar with something specified; unaware or ignorant," The American Heritage Dictionary, Second College Edition (1982), 663, or "Free from guilt; acting in good faith and without knowledge of incriminatory circumstances, or of defects or objections." Black's Law Dictionary, Fifth Edition. Thus, whether TCL is an innocent

person within the meaning of the statute depends on whether TCL as a corporate entity had knowledge of the acts of Martin.

Fletcher Cyclopedia of Corporations states the general rule regarding the knowledge of a corporation:

> [T]he general rule is well established that a corporation is charged with constructive knowledge, regardless of its actual knowledge, of all material facts of which its officer or agent receives notice or acquires knowledge while acting in the course of employment within the scope of his or her authority, even though the officer or agent does not in fact communicate the knowledge to the corporation." Fletcher Cyc Corp §790 (Perm Ed).

This rule has long been recognized by the Supreme Court of the State of North Carolina, *Le Duc v. Moore*, 15 S.E. 888, 889 (N.C. Sup. 1892), and the Fourth Circuit, *Phoenix Savings and Loan, Inc. v. Aetna Casualty & Sur. Co.*, 381 F.2d 245, 250 (4th Cir. 1967). Where the agent is not acting **solely** on his own behalf, but instead the officer and corporation have aligned but differing interests, no exception exists to the general rule, as the North Carolina Supreme Court held in *Hice v. Hi-Mil, Inc.*, 273 S.E.2d 268, 272 (N.C. 1981).

Even where interests are not so aligned, where the officer has knowledge when acting in his official capacity in a transaction, knowledge is imputed to the corporation. Thus in *Le Duc v. Moore*, supra., in an action by a receiver of a bank against the maker and payee on a promissory note, where the former president of the bank was payee and endorsed it to the bank for his own benefit, the court held that the bank took the note with notice of any defense existing in favor of the maker as against the payee at the time or before endorsement. The rule extends to fraudulent actions by the officer:

> Where the act of an officer of a corporation constitutes a fraud upon a third person, or upon another corporation of which he or she is also an officer, the first-mentioned corporation is

> chargeable with notice of the nature of the transaction, although the fraud is perpetrated for the officer's own benefit, where the officer also represents the corporation in the transaction." Fletcher Cyc Corp §829 (Perm Ed).

Thus, under North Carolina law, TCL was charged with proving that any act by Martin complained of as the basis for this action was taken **solely** for Martin's own benefit, **and** that no officer acted in his or her official capacity in taking the action. Otherwise, TCL had knowledge of the action, and is not innocent.

Louis Hevey, treasurer of TCL, with responsibility for seeing that all of the financial records of Twentieth Century were properly maintained, was aware that various bank accounts had been set up in the name of TCL but had not been included in the financial records of the company. [A 25] Martin had knowledge of all acts for which a guilty verdict was rendered against him. [A 33. 65][3] The conviction on which these facts are based is on appeal at the time of submission of this Petition. Martin asserts that solely for the purpose of determining the correctness of the grant of summary judgment to TCL, as the party with the burden of proof, viewing the evidence in the light most favorable to the non-movants Martin and Cooper requires the inference that the conviction might be reversed on appeal, and that therefore the facts derived from that conviction must be disregarded if supportive of the movant's position.

TCL has asserted on brief below that **all officers and directors had actual knowledge of the transactions** which form the basis of TCL's claim, thus TCL had not only imputed knowledge but also actual knowledge of the transactions. *Hice v. Hi-Mil, Inc.*, supra.; *Le Duc v. Moore*, supra. There is no evidence that any officer of TCL was not acting in their official capacity, or that the actions taken were not intended to benefit TCL, at least in

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[3]Although not briefed, Martin also asserts that reliance on a non-final conviction in the grant of summary judgment would be a violation of his right to due process under the United States Constitution, since reversal of the conviction after rendition of summary judgment based on the conviction would lead to the anomalous result of a final judgment with no evidence of a material fact.

part. To avoid imputation of even undisclosed knowledge to TCL, TCL was charged with proving the material facts that any act by Martin complained of as the basis for this action was taken **solely** for Martin's own benefit, **and** that **no** officer acted in his or her official capacity in taking the action. Fletcher Cyc Corp §829 (Perm Ed). There is no evidence to support such a finding, although there is substantial evidence to the contrary.

(2). That TCL was injured or damaged in its business or property

The essence of this element is simple; TCL must have been injured or damaged. It is elementary that no injury or damage can arise from money rightfully paid, and money is rightfully paid if paid pursuant to a valid contract between the parties. As held by the North Carolina Supreme Court:

> Notwithstanding the fiduciary relationship existing between officers and the corporation which they serve, contracts fixing the amount and method of paying compensation for services to be rendered are not void or voidable per se. ... The right of action which accrues for the fixing and taking by one in authority of salaries, bonuses, or other monies not honestly earned and fairly owing is based on fraud. When one seeks to recover for wrongs fraudulently inflicted, he must allege the facts which, if proven, will establish the fraud." *Fulton v. Talber*, 120 S.E.2d 410, 411 (N.C. 1961).

Thus under North Carolina law, where payments were made pursuant to contracts between TCL and Martin or others, TCL would have the burden of proving fraud to establish **any** damages for money so paid.

Substantial amounts were transferred between accounts held in the name of TCL and to Martin individually, in furtherance of a scheme or artifice to defraud money and property from **policy holders of TCL**, or the **North Carolina Life, Accident, and Health Insurance Guaranty Association** or **Florida Life and Health Insurance Guaranty Association**, or the **minority**

stockholders in Twentieth Century Financial Corporation of America (TCFCA). [A 33, 65] There is no amount ascertainable from the evidence properly before the district court , the indictment and verdict, regarding the amount by which TCL was damaged, if at all.

No scheme to defraud TCL is an element of the offenses charged in the Indictment and Verdict, thus it constitutes no evidence of damage to TCL. *United States v. Myers*, 38 F.R.D. 194, 196 (N.D. Cal. 1964). Thus movant TCL did not carry its burden of establishing this material fact, and summary judgment should not have been granted.

(3). By reason of

Although brought as an action under North Carolina civil RICO, the near identity of language used in that statute and the language found in the federal civil RICO statute, 18 U.S.C. §1964(c), and the absence of state court decisions interpreting the North Carolina statute justifies looking to federal precedent for guidance in interpreting the meaning of "by reason of." The United States Supreme Court explained the import of this rule of causation applied to civil RICO actions:

> As the Seventh Circuit has stated, "[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (1984), aff'd post, p. 606." *Sedima v. Imrex*, 473 U.S. 479, 496-497 (1985).

The Fourth Circuit addressed this question in *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990), in which it stated:

> [W]e believe *Sedima* instructs us to employ a traditional causation analysis in determining whether a RICO plaintiff has been injured "by reason of" a section 1962 violation. *Brandenburg v. Seidel*, 859 F.2d 1179, 1189 (4th Cir. 1988) (traditional proximate cause analysis applies to

> the "by reason of" language of §1964(c)). (footnote omitted) See also *Ocean Energy II v. Alexander & Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir. 1989) (same); *Bass v. Campagnone*, 838 F.2d 10, 12 (1st Cir. 1988) (under Sedima, "the inquiry is not whether the plaintiff has alleged a direct or indirect injury, but rather whether he or she has alleged an injury that 'flows from' the predicate acts"). 896 F.2d at 840.

Thus TCL would have the burden of proving that the damages complained of were proximately caused by the violations made the basis of the complaint.

Even assuming that Martin's conviction will be affirmed on appeal, the predicate acts there established which potentially constitute evidence of a pattern of racketeering activity only relate to **damages which may have been caused against entities other than TCL**, since TCL was not an entity alleged to have been the object of scheme, only **policy holders** of TCL, or the **North Carolina Life, Accident, and Health Insurance Guaranty Association** or **Florida Life and Health Insurance Guaranty Association**, or the **minority stockholders in TCFCA**. [A 26, 58] *United States v. Myers*, supra.

As this Court wrote in *Sedima v. Imrex*, supra, at 496-497 (1985):

> As the Seventh Circuit has stated, "[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (1984), aff'd post, p. 606."

Since the predicate acts as alleged and proved under the Indictment and Verdict did not cause damage to TCL directly, it was incumbent upon TCL to establish how the "pattern of racketeering activity" comprised of those predicate acts was the proximate cause of harm to **TCL**, the plaintiff in this case. *Busby*,

supra. This it failed to do, and grant of summary judgment was improper.

(4). Any violation of N.C.G.S. 74D-4 involving a pattern of racketeering activity

N.C.G.S. §75D-4 provides in relevant part that:

(a) No person shall:

> (1) Engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or
>
> (2) Conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or * * *

N.C.G.S. §75D-3 defines pattern of racketeering activity:

> (b) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents..."

Again, in the absence of state court decisions interpreting the North Carolina statute, federal precedent may provide guidance in interpretating the meaning of the term "pattern of racketeering activity," particularly in light of the fact that the North Carolina statutory provision is consistent with the interpretation of the federal provision adopted in *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 238, 109 S.Ct. 2893, 2900, 106 L.Ed.2d 195 (1989). As noted by this Court in that case:

> A "pattern" is an "arrangement or order of things or activity," 11 Oxford English Dictionary 357

> (2d ed. 1989), and the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or "arranged." 492 U.S. at 238, 109 S.Ct. at 2900.

The counts of mail fraud upon which Martin was found guilty were based upon representation by Hevey to the Florida Insurance Commission regarding total premiums received and representations by Martin to TCFCA shareholders, [A 33, 65], which in turn were the basis for the money laundering counts. Thus, when taken together, these predicate acts could constitute a pattern of racketeering activity within the meaning of the North Carolina statute.

(5). Grant of TCL's Motion for Summary Judgment was erroneous

Grant of TCL's Motion for Summary Judgment was erroneous, since genuine issues of material fact exist with respect to at least three of the four essential elements on which TCL bore the burden of proof, and should be reversed.

3. TCL's Motion for Summary Judgment Against Cooper Was Erroneous Since Not Supported By Evidence Complying With Rule 56

Similarly, regardless of the standard of conduct (whether constructive fraud arising from breach of fiduciary duty as argued by TCL, or under N.C.G.S. 55-8-42 as argued by Cooper) by which Cooper's actions are measured, the evidence in compliance with Rule 56 fails to support the Summary Judgment rendered against Cooper since there is not evidence of causation of damage to TCL as a corporate entity, or the amount of damages, if any, as discussed above.

II. Failure To Allow Amendment and Supplementation Of The Defendants' Answers And State Affirmative Defenses And Counterclaims Is Reversible Error.

A. Standard of Review

The governing portion of Rule 15(a) of the Federal Rule of Civil Procedures provides that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The decision of the trial court regarding whether leave to amend should be granted is subject to reversal for abuse of discretion. *Foman v. Davis*, 83 S.Ct. 227, 230, 371 U.S. 178, 182, 9 L.Ed.2d 222 (1962). The Fourth Circuit, in *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980), stated:

> Discretion to deny leave to amend is limited by the principle, embodied in Rule 15(a) that "leave shall be freely given when justice so requires," and by the general policy embodied in the Federal Rules favoring resolution of cases on their merits. See Fed.R.Civ.P. 1. A court may not then use its discretion either arbitrarily, or in a way that undermines the basic policy of the rule.

615 F.2d at 613.

B. When leave to amend may be denied

This Court articulated the standard for whether a district court's action denying a motion for leave to amend constituted an abuse of discretion in *Foman v. Davis*, when it wrote:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), ¶¶ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his

> claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules. 83 S.Ct. at 230, 371 U.S. at 182.

C. No prejudice could have been shown if leave to amend were to have been granted.

To demonstrate undue prejudice, more must be shown than that the opponent will be required to meet alternative or increased claims, *United States v. Hougham*, 364 U.S. 310, 316-317, 81 S.Ct. 13, 18, 5 L.Ed.2d 8 (1960), or cured or amplified defenses. *See* Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1487, n. 14-16. Where the opposing party is aware of the facts underlying a new theory of recovery or defense stated in the amended pleading, no undue prejudice exists justifying denial. *Davis*, at 613; *Yellow Bus Lines, Inc. v. Local Union*, 883 F.2d 132, 145 (D.C. Cir. 1989); *Sweetheart Plastics, Inc. v. Detroit Forming, Inc.*, 743 F.2d 1039, 1043 (4th Cir. 1984). Only where amendment will substantially adversely affect the opposing party's ability to contest the claim, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795 (1971) (amendment offered asserting new theory of defense one year after trial), or unduly increase discovery or delay the trial, Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1487, n. 15, does sufficient prejudice exist to justify denial.

The Order denying leave to amend recites that "permitting Martin to file an Amended Answer and counterclaims at this late

date would be unduly prejudicial...." [A 10] The Order fails to state any basis upon which leave to amend would be prejudicial, because leave would have caused no prejudice to TCL whatsoever under the law: allowing Martin to plead his case would have simply required that TCL prosecute its claim and defend against asserted affirmative defenses and counter-claims on the merits instead of limited pleadings. No showing was made by TCL that allowing leave would cause undue prejudice by substantially adversely affecting its ability to contest the claim, or would unduly increase discovery. To the contrary, TCL asserted in its Response to Martin's Motion "that it did not desire to engage in any discovery because the six week federal criminal trial had effectively revealed all of the evidence relevant to the matters in controversy." As in *Davis*, TCL was "fully aware of the events giving rise to the action, allowance of the amendment could not in any way prejudice the preparation of the defendant's case." 615 F.2d at 613. If no prejudice will accrue to the opponent, the amendment should be allowed. *Davis*, 615 F.2d at 613; Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1487.

D. Martin's Motion for Leave to Amend was timely.

Although not specifically addressed in the court's Order, TCL stated in its Response that "...if the relief requested by the Defendant Martin is granted the trial of this matter, currently scheduled for February 18, 1996, [sic[4]] will inevitably be delayed." [A 10] No suggestion was made, however, how such delay might prejudice TCL. The Fourth Circuit, writing in *Sweetheart Plastics, Inc.* , supra, at 1043, held that "Absent prejudice to the opposing party, the mere fact that an amendment is offered late in the case is not enough to bar it." This rule is also stated by the court in *Security Insurance Company of Hartford v. Tucker & Associates, Inc.*, 64 F.3d 1001, 1009 (6th Cir. 1995):

> Delay alone, however, does not justify the denial of leave to amend. Rather, **the party opposing a motion to amend must make some significant showing of prejudice to prevail.** "Delay that is

[4]The correct date was March 18, 1996.

> neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself to disallow an amendment of a pleading[.]" *Moore v. City of Paducah*, 790 F.2d 557, 561 (6th Cir. 1986) (quoting *Tefft v. Seward*, 689 F.2d 637, 639 n.2 (6th Cir. 1982)).

64 F.3d at 1009. (emphasis added)

It is clear from Martin's Motion that any delay was not intended to harass, but was founded solely on his desire to preserve his constitutional right against possible self-incrimination under the Fifth Amendment to the United States Constitution. Thus the Motion to Amend, initially made immediately after the scheduled sentencing date, requests that leave be granted to amend for the first time promptly following sentencing — "ten days after the granting of this motion or ten days after the sentencing hearing, which ever [sic] is later." [A 20] Not only was no "significant showing of prejudice" made by TCL, **no** showing of prejudice was made by TCL.

Even were some prejudice to be inferred, however, the delay was not excessive and was excusable, and amendment should have been allowed. *See* Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1488. Where delay is attributable to a change in circumstances, such as completion of other pending legal proceedings, *Security Insurance Company of Hartford* , supra, (case dormant for 13 of 16 months due to pending bankruptcy); *Bush v. Muncy*, 659 F.2d 402, 413 (4th Cir. 1981), (motion made following mooting of prior requested relief); or acquisition of new information in course of proceeding, *Island Creek Coal Company v. Lake Shore, Inc.*, 832 F.2d 274 (4th Cir. 1987) (delay of 3 1/2 years after inception of action, but only 3 months after receipt of information obtained through deposition of defendant's witness); or action by the Court hearing case, *Yellow Bus Lines, Inc. v. Local Union*, supra, at 145, (two months elapsed between the March 31, 1984 hearing at which the court first expressed doubts about the deficiencies of the original pleading and Yellow Bus' request to amend those pleadings), delay must be determined from the time of the change in circumstances. Only with sentencing would the pending parallel criminal have come to

a conclusion, and would Martin no longer have had reason to assert his Fifth Amendment privilege.

Martin moved with more than reasonable alacrity and in good faith to correct his pleadings, filing on the day his counsel made his first appearance and requesting only ten days in which to amend his Answer after completion of the parallel proceeding. At the time of the motion, *this* action against Martin was only one year and four months old, including the period prior to removal to the District Court, and only eleven months had passed since the original Answer was filed pro se. For nine months of that period the proceedings had been stayed, thus **this case had been in active litigation for only eight weeks since the filing of the original Answer, regardless of the status or duration of other related proceedings. No showing was made by TCL of the need for expedited disposition of this matter.**

Given the size of the claim against Martin, the complexity of the underlying facts, and the potential counterclaim for intentional wrong-doing by the Department of Insurance of the State of North Carolina, justice required that leave to amend be granted.

E. Futility

In its Order, the District Court states that "permitting Martin to file an Amended Answer and counterclaims ...would be ... futile...." [A 10] The Fourth Circuit wrote in *Davis*, 615 F.2d at 613, "Unless a proposed amendment may clearly be seen to be futile because of substantive or procedural considerations, see, e.g., *DeLoach v. Woodley*, 405 F.2d 496, 497 (5th Cir. 1968), conjecture about the merits of the litigation should not enter into the decision whether to allow amendment." It is mysterious how the Court could have arrived at any reasoned evaluation of applicable substantive or procedural considerations since the Order recites "To date, the court still is in the dark with regard to what affirmative defenses and counterclaims Martin would add, if permitted to do so."

Clearly, no showing was made by TCL that no possible affirmative defense or counterclaim would have merit. A more reasonable inference is that the Court indulged in impermissible conjecture about the merits of the litigation, particularly in light of the settlement conference direction by the Court eight days prior

to entry of the Order. That direction is reflected by the docket entry that "Court recommended that the defendants work on settling this case by possibly signing a confession of judgment. The court will give counsel unt Tuesday, 1/9/96 to meet/speak with the defendants and discuss settling this case by entering a confession of judgment."

Had the Court simply granted leave to amend when requested two months before its action (whether outright or on condition), as it should have, it would have had full knowledge of the affirmative defenses and counterclaims which Martin would have asserted, and would have been able to reach a **reasoned** evaluation of whether they were futile as a matter of law, and not have acted "in the dark." "In the dark," the Court could not have possibly seen whether the potential amendments were clearly futile, thus denial of leave to amend was improper.

F. Conditions

Assuming arguendo that the Court perceived on undisclosed grounds the possibility of undue prejudice in granting leave without prior presentation of the proposed amendment, the Court might well have conditioned consideration of the Motion on submission of the proposed amendment. As noted in Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1486:

> [T]he court may use its discretion to impose conditions of the allowance of a proposed amendment as an appropriate means of balancing the interests of the party seeking the amendment and those of the party objecting to it. The imposition of terms often will further the rule's liberal amendment policy. If the party opposing the amendment can be protected by the use of conditions from any possible prejudice that might result from the untimeliness of the amendment, there is no justifiable reason for not allowing it.

This course was adopted by the District Court in *Schwab v. Nathan*, 8 F.R.D. 227 (D.C.N.Y. 1948).

The District Court in the instant case, however, chose to simply deny Martin's Motion for Leave to Amend. This action, in the words of this Court in *Foman*, "is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." 83 S.Ct. at 230, 371 U.S. at 182. Its refusal to give leave to amend should be reversed.

G. The court thwarted the constitutionally-protected right of Martin and Cooper against self-incrimination by refusing amendment and supplementation once the criminal trials were concluded.

After the verdict in the criminal case in Florida, Cooper also sought to address the allegations made in TCL's complaint. Cooper explained in her supporting memorandum in the district court that she wished to "present other or further defenses than those set forth in her original Answer – something she could not do previously without fear of self-incrimination." By denying the request, the court thus punished Cooper for previously exercising her constitutional right against self-incrimination.

The Fifth Amendment privilege against self-incrimination protects an individual not only from involuntarily becoming a witness against herself in a criminal proceeding, but also from answering specific allegations in the complaint in a civil action and from filing responses to interrogatories that might incriminate her in future criminal actions. *See, Rogers v. Webster,* 776 F.2d 607 (6th Cir. 1985), and *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924 (7th Cir. 1983). Of course, a blanket assertion of that right might be insufficient to avoid a judgment on the pleadings. *North River Insurance Co., Inc. v. Stefanou*, 831 F.2d 484 (4th Cir. 1987), cert. denied, 486 U.S. 1007, 108 S.Ct. 1733, 100 L.Ed. 196 (1988). But, in the present case, in the shadow of sentencing, both Cooper and Martin moved to amend and supplement their answers, not resting upon a "blanket assertion" of her privilege. Despite that pending motion, the Court granted summary judgment on the scant ground that Cooper had not offered a proposed amendment even though the Court conceded that no rule required her to do so. This would hardly be

a compelling basis for depriving Cooper of her rights. *See, LaSalle Bank Lake View v. Seguban*, 54 F.3d 387 (7th Cir. 1995).

III. North Carolina General Statute § 75D is a criminal or quasi-criminal statute, thus grant of a summary judgment violates the defendant Martin's right to due process under the U.S. Constitution.

A. A statute may be civil in form, but criminal for purposes of constitutional safeguards.

This Court has considered the question of when a statute civil in form is quasi-criminal or criminal for purposes of protections afforded by the U.S. Constitution. In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167, 83 S.Ct. 554 (1963), it held that whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, and whether the behavior to which it applies is already a crime, are all factors for examination in making such a determination, as is the intent of the legislature. Although N.C.G.S. §75D-4(b) provides that the statute is to be civil, the declaration is found in N.C.G.S. §75D-2(b) that "The General Assembly declares that the purpose and intent of this Chapter is: **to deter** organized **unlawful activity by imposing** civil equitable **sanctions** against this subversion of the economy by **organized unlawful elements**;...."

Clearly the purpose of this act is to deter criminal acts, falling squarely within the factors set out in *Kennedy v. Mendoza-Martinez*, supra. This conclusion has been reached by at least one commentator: "The clause purporting to declare a RICO violation a civil offense is merely a subterfuge for the general assembly's true intention." Note: *North Carolina RICO: A Critical Analysis and User's Guide*, 66 N.C.L. Rev. 445, 453.

As written in *Kennedy v. Mendoza-Martinez*:

> This being so, the Fifth and Sixth Amendments mandate that this punishment cannot be imposed

> without a prior criminal trial and all its incidents, including indictment, notice confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses. If the sanctions these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further.

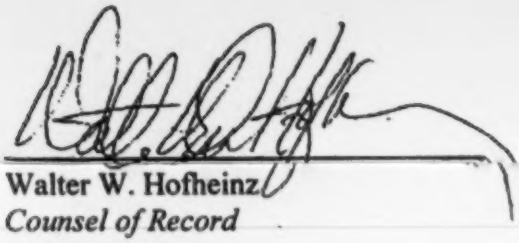
372 U.S. at 167. Accordingly, summary judgment in favor of the Commissioner of Insurance of the State of North Carolina as Liquidator of TCL should be reversed.

Conclusion

The summary judgment rendered for TCL against each of Martin and Cooper are not supported by evidence meeting the requirements imposed by Rule 56. The district court's failure to grant leave to amend and supplement under Rule 15 to each of Cooper and Martin was an abuse of discretion, and violated the defendants' right against self-incrimination under the U.S. Constitution. North Carolina General Statute § 75D is a criminal or quasi-criminal statute, thus grant of a summary judgment violates the defendant Martin's right to due process under the U.S. Constitution.

Writ of certiorari should be granted in this case because the courts below rendered judgment directly contrary to prior decisions of this Court construing the requirements of Federal Rule of Civil Procedure 56, Federal Rule of Civil Procedure 15, and the spirit of the Rules as a whole. Without strict adherance to the requirements of the Rules and the procedural protections afforded litigants, and supervision of adherance by this Court, summary judgment practice becomes an opportunity for trial courts to adjudicate by prejudice, assumption, and hearsay without opportunity for litigants to test the credibility or accuracy of purported evidence, and an indictment of the fundamental fairness of the judicial process.

Respectfully submitted this 21st day of September, 1998.



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